LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

86 1490

No. .....

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

—o—

THE GOVERNOR AND ATTORNEY GENERAL OF THE STATE OF TENNESSEE,

Petitioners,

vs.

LEONARD M. BROOKS, M.D.,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

W. J. MICHAEL CODY
Attorney General and Reporter
State of Tennessee

JOHN KNOX WALKUP
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-1963

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

In determining an attorney's fee award under 42 U.S.C. § 1988 or comparable statutes, must the District Court consider the "contingency factor" or "risk" undertaken by plaintiff's counsel as a basis for upwardly adjusting the fee?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT:	
THE COURT SHOULD DECIDE THIS CASE IN TANDEM WITH *PENNSYLVANIA, ET AL. V. DELAWART VALLEY CITIZENS' COUNCIL FOR CLEAN AIR,* S.Ct. NO. 85-5, DECIDED IN PART, — U.S. —, RELEVANT ISSUE *REARGUED* OCTOBER 15, 1986, WHICH PRESENTS AN ISSUE IDENTICAL TO BOTH CASES, IN ORDER TO ENSURE THAT THE SIXTH CIRCUIT DECISION WILL NOT ESCAPE THE IMPACT OF THE COURT'S ULTIMATE RULING ON THE COMMON, IDENTICAL ISSUE	6
CONCLUSION	7
APPENDIX	A1

TABLE OF AUTHORITIES

Page

CASES CITED:

Brooks v. Alexander, No. 85-6114 (6th Cir. Dec. 9, 1986) 5, 6, 7

Brooks v. Alexander, No. 79-3065 (M.D. Tenn. Sept. 13, 1984) (Memorandum and Order awarding Attorney's Fees) 5, 6, 7

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 4

Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268 (6th Cir. 1983) 5

Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979) 5

Pennsylvania, et al. v. Delaware Valley Citizens' Council For Clean Air, S.Ct. No. 85-5, decided in part, — U.S. —, relevant issue *reargued* October 15, 1986 ..... 6, 7, 8

STATUTES CITED:

FEDERAL:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1988 ..... 2, 3, 7

42 U.S.C. § 7604(d) 6

STATE:

T.C.A. § 39-4-201(c)(2) 3

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1986

—o—

THE GOVERNOR AND ATTORNEY GENERAL OF THE STATE OF TENNESSEE,

Petitioners,

vs.

LEONARD M. BROOKS, M.D.,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

The petitioners, the Governor and Attorney General of the State of Tennessee, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 9, 1985.

—o—

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in this cause, which has not been

designated for publication, is reprinted in the Appendix at A1. The Sixth Circuit Opinion reviews an Opinion of the United States District Court for the Middle District of Tennessee, also unreported, which is reprinted in the Appendix at A9.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 9, 1986 and this Petition for Certiorari was timely filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the

Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. *In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.* (Emphasis supplied).

———o———

STATEMENT OF THE CASE

On September 13, 1984, the United States District Court for the Middle District of Tennessee awarded the respondent, Leonard Brooks, M.D., $30,298.87 in attorney's fees and expenses in this cause under 42 U.S.C. § 1988.[1] Dr. Brooks' fee award was predicated on his successful challenge to the constitutionality of a provision of Tennessee's abortion law.[2] The fee awarded by the District Court was limited to a "loadstar" figure, or the number of hours spent multiplied by a reasonable hourly rate. The figure also included reasonable expenses. The District Court declined Dr. Brooks' request that the fee be

---

[1] Dr. Brooks had petitioned the District Court for $187,620.97 for counsel fees and expenses in the District Court litigation. The Court, however, reduced this to the $30,298.87 actually awarded. The District Court further denied Dr. Brooks' request for $62,538.75 for attorney's fees in ancillary state administrative proceedings involving his medical license.

[2] The statute in question, T.C.A. § 39-4-201(c)(2), prohibited abortions from being performed outside of a licensed hospital after the first trimester of pregnancy.

upwardly adjusted. The Court did so solely on the basis of the *manner* in which Dr. Brooks obtained his status as a prevailing party.

Indeed, Dr. Brooks' success in the case, which was filed in 1979, came in a curious fashion. After a brief period of discovery in early 1980 and several trial continuances, the case was put on the Court's "retired docket". That action was taken when it became apparent to the parties and the Court that the constitutionality of the Tennessee statute in question would likely be resolved by an action then-pending before the Sixth Circuit Court of Appeals. Eventually, the Sixth Circuit case was decided by this Court. In *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), this Court ruled as unconstitutional an ordinance of the City of Akron, Ohio which contained a restriction identical to the Tennessee Code provision challenged by Dr. Brooks. Based on the *Akron* case, the District Court, upon a motion for judgment on the pleadings, ruled the Tennessee statute unconstitutional. Except for that Motion and the aforementioned period of discovery, there was no other substantial activity in the District Court.

In light of the progression of the case, the District Court found an upward adjustment of the loadstar figure to be inappropriate. In the words of the Court:

> It is the opinion of this Court, in accordance with the purpose of the Fee Awards Act, that the circumstances of this case do not merit an upward adjustment. Plaintiff's success was predicated not upon his own ability and endeavor as this issue wound its way to victory before the Supreme Court but rather hinged on the outcome of another case with the identical issue.

> *See Akron Center for Reproductive Health, Inc. v. City of Akron,* — U.S. —, 103 S.Ct. 2481 (1983). To permit plaintiff to recover an upwardly adjusted fee based on the success of the plaintiff's attorneys in *Akron* is not warranted. Indeed, fortuity is not an element to consider when contemplating an upward adjustment.

Brooks v. Alexander, No. 79-3065 (M. D. Tenn. Sept. 13, 1984) (Memorandum and Order awarding attorney's fees), slip op. p. 8 (A16).

Dr. Brooks appealed the District Court's fee award to the United States Court of Appeals for the Sixth Circuit on November 27, 1985. Dr. Brooks challenged the award as being inadequate on several grounds. The Court of Appeals rejected Dr. Brooks' arguments in all respects except one. The Court of Appeals ruled that the District Court, in denying an upward adjustment, erred in not *considering* the "risk" undertaken by Dr. Brooks' counsel and the unpopularity of the case. *Brooks v. Alexander,* No. 85-6114 (6th Cir. Dec. 9, 1986), *slip op.* p. 4 (A5). The Court predicated its ruling on several well established Sixth Circuit opinions. *See, Louisville Black Police Officers Org. v. City of Louisville,* 700 F.2d 268 (6th Cir. 1983) and *Northcross v. Board of Educ.,* 611 F.2d 624 (6th Cir. 1979); *cert. denied,* 447 U.S. 911 (1980). The Court of Appeals concluded:

> We find that the District Court failed to exercise its discretion to consider plaintiff's claim for an upward adjustment in the hourly rate awarded and remand the case with direction to consider the contingency factor.

Brooks v. Alexander, supra, slip op. p. 7 (A9).

———o———

REASON FOR GRANTING THE WRIT

THE COURT SHOULD DECIDE THIS CASE IN TANDEM WITH PENNSYLVANIA, ET AL. V. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, S.CT. NO. 85-5, DECIDED IN PART, — U.S. —, RELEVANT ISSUE REARGUED OCTOBER 15, 1986, WHICH PRESENT AN ISSUE IDENTICAL TO BOTH CASES, IN ORDER TO ENSURE THAT THE SIXTH CIRCUIT DECISION WILL NOT ESCAPE THE IMPACT OF THE COURT'S ULTIMATE RULING ON THE COMMON IDENTICAL ISSUE.

This Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit presents the identical issue which the Court will decide in *Pennsylvania et al. v. Delaware Valley Citizens' Council For Clean Air*, S.Ct. No. 85-5, decided in part, — U.S. —, relevant issue *reargued* October 15, 1986. In the *Delaware Valley Citizens'* case, the Court is reviewing a decision of the United States Court of Appeals for the Third Circuit which presents the sole issue of "risk of loss" as an appropriate basis to upwardly adjust an attorney's fee award under § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d).[3]

By agreeing to review the Sixth Circuit decision, this Court will prevent the *Brooks v. Alexander* decision, *supra*,

---

[3] The Court has previously rendered one opinion in this case in which it decided two other attorney's fee questions under 42 U.S.C. § 7604(d). *See Pennsylvania, et al. v. Delaware Valley Citizens' Council For Clean Air*, — U.S. — (1986). The Court, at that time, was of the view that the issue presented in the case regarding "risk of loss" as a basis for an upward adjustment of a fee award required further argument. The case was therefore restored to the argument docket on that issue alone. *Id.* at —. The case was argued to the Court on October 15, 1986.

from becoming final.[4] This will ensure that this Court's eventual ruling on the question common to both *Delaware Valley Citizens'* and the Sixth Circuit's *Brooks v. Alexander* decision will apply to the Sixth Circuit case. Not only will the equal application of the resolution of this important issue be beneficial to the parties in this case, but to other litigants and Courts in the Sixth Circuit.

———o———

[4] To this end, simultaneously with filing this Petition, the petitioners are filing a motion in the District Court requesting that it stay all further proceedings in this matter until such time as this Court decides this Petition and/or the *Delaware Valley Citizens'* case.

CONCLUSION

For reasons set forth above, the petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered December 9, 1986, to determine whether the "contingency factor" or "risk" is a proper basis for upwardly adjusting a fee award under 42 U.S.C. § 1988. The petitioners further request the Court to decide this case in tandem with *Pennsylvania, et al. v. Delaware Citizens' Council For Clean Air,* S.Ct. No. 85-5, decided in part, — U.S. —, relevant issue *reargued* October 15, 1986.

Respectfully submitted,

W. J. Michael Cody
Attorney General and Reporter
State of Tennessee

John Knox Walkup
Chief Deputy Attorney General

Frank J. Scanlon
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1963

Attorneys for Petitioners

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

No. 85-6114

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD J. BROOKS, M.D.,

Plaintiff-Appellant,

v.

LAMAR ALEXANDER, Governor of the State of Tennessee, and WILLIAM LEECH, Attorney General of the State of Tennessee,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee.

(Filed December 9, 1986)

BEFORE: KENNEDY and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Plaintiff Dr. Leonard Brooks ("plaintiff") appeals the amount of the District Court's award of attorney's fees for time spent before the District Court and the Court's denial of attorney's fees for time

spent in state administrative proceedings. Plaintiff claims that the award by the District Court for the Middle District of Tennessee was inadequate to provide a fully compensable fee because the Court refused to upwardly adjust the hourly fee to compensate for the contingency risk and unpopularity of the cause, and refused to adjust the litigation expenses for inflation. Plaintiff also claims that he is entitled to attorney's fees for the time spent in state administrative proceedings. We reverse and remand the District Court decision refusing to upwardly adjust the hourly rate, and affirm the Court's judgment in all other respects.

In September of 1978 the Tennessee Board of Medical Examiners brought an action against plaintiff, a licensed Tennessee physician. The Board sought to revoke plaintiff's medical license on the ground, among others, that he had performed second-trimester abortions outside of hospitals, in violation of what is now T.C.A. § 39-4-201(c)(2). Plaintiff asserted that the statute was unconstitutional. After a full hearing, however, the Board entered an order revoking plaintiff's license. Plaintiff appealed the decision to the Davidson County Chancery Court, which ultimately remanded the case to the Board in light of the Supreme Court's decision in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

Plaintiff also filed an action pursuant to 42 U.S.C. § 1983 to have the Tennessee statute declared unconstitutional. Shortly before trial, because *Akron v. Akron Center for Reproductive Health* was pending, the trial date was postponed. In 1983, the Supreme Court ruled in favor of the position of plaintiff. The District Court then granted

summary judgment in favor of plaintiff and declared him the prevailing party for purposes of section 1988.

On September 13, 1984, the District Court awarded plaintiff attorney's fees in the amount of $30,293.87 for time spent in that Court. The Court severed the issue of fees for time spent in ancillary proceedings, however, because the Supreme Court had granted certiorari in a case addressing that precise issue. *Webb v. County Bd. of Educ.*, 471 U.S. 234, 105 S. Ct. 1923 (1985), *aff'g* 715 F.2d 254 (6th Cir. 1983). On November 15, 1985, the District Court denied plaintiff's request for attorney's fees for the state administrative and state court proceedings based on the Supreme Court's decision in *Webb*. Plaintiff appeals from these orders.

TIMELINESS OF APPEAL

We reject defendant's claim that plaintiff's appeal is untimely. Defendant claims that the District Court's initial order awarding plaintiff attorney's fees in the amount of approximately $30,000 was a final decision because the Court had severed the issue of fees for ancillary proceedings. If it were a final decision, plaintiff would have been obligated to file his appeal by December 12, or thirty days following the November 13 decision awarding interest. Fed. R. Civ. P. 4(a)(1). Plaintiff did file a notice of appeal on December 12, but then moved to dismiss the appeal as premature. His motion was granted. On November 26, 1985, he filed a notice of appeal from both the September, 1984 and the November, 1985 orders.

The District Court severed the claim for fees arising from the ancillary proceedings and issued an initial order

granting plaintiff attorney's fees for time spent before it. It is clear that the District Court judge intended to address the case again, because he postponed his decision on the separate issue of fees for the ancillary proceedings for a later date. As the Supreme Court stated in *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), an order in final when it "clearly evidences the judge's intention that it shall be his final act in the case." *Id.* at 232. At the time of the initial order a portion of plaintiff's claim for attorney's fees was still pending. We find that the District Court's order granting plaintiff attorney's fees for time spent before that Court was not a final judgment and we therefore hold that plaintiff's appeal is timely.

FEES AND EXPENSES AWARDED FOR TIME IN DISTRICT COURT

The determination of the extent to which attorney's fees will be awarded pursuant to section 1988 is within the broad discretion of the trial court judge. An appellate court will not reverse or remand an award of fees or denial of costs unless it is clear that the district court abused its discretion. *See Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983); *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). If it awards fees in an amount less than that requested, the trial court must provide "some explanation of the reasoning used to exclude those hours which were cut, and some description of the findings which were relied upon to find that expenses and billing rates were excessive." *Northcross*, 611 F.2d at 632.

The parties in this case agreed to the reasonableness of basic hourly rates for each of plaintiff's attorneys. Plaintiff claims, however, that the District Court abused its discretion by refusing to grant an upward adjustment in these hourly rates. We find that the District Court failed to exercise its discretion in accordance with decisions of this Court. In *Northcross v. Board of Educ.*, this Court stated that "[i]n many cases [the routine hourly rate] is not 'reasonable,' because it does not take into account special circumstances, such as unusual time constraint, or an unusually unpopular cause, which affect the market value of the services rendered." *Northcross*, 611 F.2d at 638. The Court further stated that "[p]erhaps the most significant factor in these cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success." *Id.* In *Louisville Black Police Officers*, this Court did make it clear that it did not "intend to require district courts to so adjust whenever the circumstances referred to in that decision exist in a particular case." 700 F.2d at 280. It emphasized that "the district court judge who presided over a case is in the best position to evaluate the reasonableness of fee requests, both in terms of the number of hours spent and a reasonable hourly rate of compensation." *Id.* at 274. Thus, while any upward adjustment is within the discretion of the district court, the court must exercise that discretion by considering the contingency factor.

It does not appear that the District Court addressed the contingency or unpopularity factors. In holding that the facts of this case did not warrant an upward adjustment of the hourly rates, the Court stated that "[p]laintiff's success was predicated not upon his own ability and

endeavor as this issue wound its way to victory before the Supreme Court but rather hinged on the outcome of another case with the identical issue." Joint Appendix at 153. This finding disposes of any claim of an upward adjustment for outstanding results. However, the fact that plaintiff's success did not hinge on the ability of his own attorney does not change the significant risk assumed by the attorney when he accepted and prepared the case. The District Court was obligated to consider whether the contingency risk warranted an upward adjustment. The Court's failure to exercise its discretion (or if exercised, to explain its reasoning) was inconsistent with its duties as spelled out in *Northcross* and *Louisville Black Police Officers*. We remand the case to the District Court with direction to consider whether the contingency risk assumed by plaintiff's attorney and the unpopularity of the cause warrant an upward adjustment of the hourly rate.

Plaintiff also claims that the District Court should have awarded him his expenses based on their current value as opposed to the amounts actually expended. The District Court rejected this claim because it found that "the applicants [had] been fairly compensated under the circumstances of this case without the addition of a present value-based calculation." Joint Appendix at 154. This Court has not awarded reimbursement of expenses based on current value and we find no cases in other circuits awarding reimbursement on that basis. We see no reason to allow it here. We hold that plaintiff is not entitled to recover the current value of expenses incurred and we affirm the judgment of the District Court as it relates to expenses.

ATTORNEY'S FEES FOR TIME SPENT IN ANCILLARY PROCEEDINGS

Plaintiff claims that he is entitled to attorney's fees for the time spent in state administrative proceedings. The District Court postponed its decision concerning this claim until the Supreme Court had issued its decision in *Webb v. County Bd. of Educ.* It then held, in accordance with *Webb,* that plaintiff's request for attorney's fees must be denied because "the medical administrative proceedings in the present case as well as the subsequent appeal to state court are 'not any part of the proceedings to enforce § 1983.' " Joint Appendix at 163. We agree with the District Court's application of *Webb* and affirm its denial of attorney's fees for time spent in ancillary proceedings.

In *Webb,* the Board of Education of Dyer County, Tennessee, terminated petitioner's employment. The petitioner contended at administrative proceedings that his constitutional rights had been violated because his discharge was racially motivated. The Board decided to adhere to its termination decision and the petitioner brought an action pursuant to section 1983. When he prevailed in the district court, the court awarded attorney's fees for the time spent on the judicial proceedings, but denied fees for the time spent on the administrative proceedings. This Court affirmed the district court decision and the Supreme Court affirmed.

The Supreme Court noted first that under section 1988 a prevailing party may be granted attorney's fees arising from an "action or proceeding to enforce [§ 1983]." *Webb,* 105 S. Ct. at 1928. It further noted that, unlike Title VII litigation, "nothing in § 1983 requires that a plaintiff exhaust his administrative remedies

before bringing a § 1983 suit." *Id.* at 1927 (citing *Smith v. Robinson,* 468 U.S. 992 (1984)). Section 1983 was found to be an independent avenue of relief. The Court continued:

> Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory.

Id. at 1928. The Court did suggest that attorney's fees might be awarded for "any discrete portion of the work product from the administrative proceedings [that] was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation" in federal court. *Id.* at 1929. The Court denied the petitioner's claim for attorney's fees because it found no indication that a discrete portion of the attorney's time in the administrative proceeding had further the section 1983 action.

The facts in the case before this Court are closely analogous to those in *Webb.* We reject plaintiff's claim that because he was required to appear before the Board of Medical Advisers the administrative proceeding was required for the section 1983 suit. The medical administrative proceeding was no more a part of the section 1983 action than was the administrative proceeding in *Webb.* Furthermore, the District Court found, as did the Supreme Court in *Webb,* that there was no "indication that the administrative (or subsequent state judicial) proceedings had the effect of advancing the federal civil rights litigation to resolution." Joint Appendix at 163. We affirm the Dis-

trict Court's denial of plaintiff's claim for attorney's fees for the time spent in ancillary proceedings.

CONCLUSION

We find that the District Court failed to exercise its discretion to consider plaintiff's claim for an upward adjustment in the hourly rate awarded and remand the case with direction to consider the contingency factor. We affirm the District Court's decisions denying the current value of expenses incurred and denying an award of fees for time spent in proceedings ancillary to the section 1983 action.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

LEONARD J. BROOKS, M.D.	)	
	)	
VS.	)	
	)	DOCKET
LAMAR ALEXANDER, Governor	)	NO. 79-3065
of the State of Tennessee, and	)	
WILLIAM LEECH, Attorney	)	
General of the State of	)	
Tennessee	)	

(Entered September 13, 1984)

MEMORANDUM

The plaintiff in this action, Dr. Leonard J. Brooks, was declared the prevailing party in this civil rights action on August 4, 1983. Pending in this case is plaintiff's request for attorney fees pursuant to 42 U.S.C. § 1988. This cause came on to be heard on August 14, 1984. The

following represents the conclusions of this Court regarding plaintiff's attorney fees.

The complaint was filed February 8, 1979, challenging the constitutionality of TENN. CODE ANN. § 39-301, *et seq.* Before the case could be tried, the Sixth Circuit decided *Akron Center For Reproductive Health, Inc. v. City of Akron,* 651 F.2d 1198 (1981), directly on point against plaintiff. Subsequently, the Supreme Court granted certiorari in the *Akron* case and ruled in favor of petitioners and consequently in favor of the position of the plaintiff in this action. — U.S. —, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). This Court then granted judgment on the pleadings.

Plaintiff has filed affidavits wherein the time spent on this lawsuit is reconstructed. Although contemporaneously maintained records were not consistently kept, plaintiff avers that the reconstruction adequately represents the services which were performed. Plaintiff requests attorney fees in the following amounts:

A. SERVICES RENDERED IN UNITED STATES DISTRICT COURT:

(1) 206.75 hours for attorney Bart Durham at $125.00 per hour, totaling $25,843.75, plus a 200 percent upward adjustment[1] for a total of $77,531.25

---

[1] Plaintiff seeks an increase in hourly rates based on the difficulty, probability of success and contingency basis of this case. Although plaintiff requests an upward adjustment of 300% to his hourly rate, the actual computed increase in plaintiff's pleadings is only 200%. The Court's findings reflect this inadvertency.

(2) 132.50 hours for attorney Vickey Verwey at $90.00 per hour, totaling $11,925.00, plus 200 percent upward adjustment for a total of $35,775.00

(3) 4.5 hours for attorney Marion Wall at $90.00 per hour, totaling $405.00, plus a 200 percent upward adjustment for a total of ..... $ 1,215.00

(4) 64.0 hours for paralegal Anne Johnson at $35.00 per hour, totaling $2,240.00, plus a 200 percent upward adjustment for a total of ..... $ 6,720.00

(5) 1.0 hours for attorney Dick Dorris at $90.00 per hour, totaling $90.00, plus a 200 percent upward adjustment for a total of ... $ 270.00

(6) Expenses totaling ..... $ 3,520.97

SUBTOTAL $125,032.22

B. SERVICES RENDERED IN ANCILLARY PROCEEDINGS:[2]

(1) 91.5 hours for Bart Durham at $125.00 per hour, totaling $11,437.50, plus a 200 percent upward adjustment for a total of $34,312.50

(2) 45.0 hours for attorney Stephanie Ashe at $90.00 per hour, totaling $4,050.00, plus a 200 percent upward adjustment for a total of $12,150.00

(3) 29.5 hours for Vickey Verwey at $90.00 per hour, totaling $2,655.00, plus a 200 percent upward adjustment for a total of ..... $ 7,965.00

(4) 40.0 hours for paralegal Tom Ware at $35.00 per hour, totaling $1,400.00, plus a 200 percent upward adjustment for a total of ..... $ 4,200.00

---

[2] Plaintiff seeks attorney fees for time spent in administrative and state court proceedings.

(5) Expenses totaling	$ 975.25
SUBTOTAL	$59,602.75

C. SERVICES RENDERED FOR PREPARATION OF APPLICATION FOR ATTORNEY FEES

(1) 97.75 hours for Bart Durham at $125.00 per hour, totaling $12,218.75, plus a 200 percent upward adjustment for a total of	$36,656.25
(2) 246.50 hours for Tom Ware at $35.00 per hour, totaling $8,627.50, plus a 200 percent upward adjustment for a total of	$25,882.50
SUBTOTAL	$62,538.75

D. SUPPLEMENTAL REQUESTS FOR ATTORNEY FEES[3]

(1) 22.65 hours for Bart Durham at $125.00 per hour, totaling $2,831.25, plus a 200 percent upward adjustment for a total of	$ 8,493.75
(2) 3.5 hours for attorney Dick Eason at $90.00 per hour, totaling $315.00, plus a 200 percent upward adjustment for a total of	$ 945.00
(3) 13.75 hours for attorney Roy Lucas at $200.00 per hour, totaling $2,750.00, plus a seventy-five percent upward adjustment for a total of	$ 4,812.50
(4) 5.25 hours for attorney Lynn Miller at $125.00 per hour, totaling $656.25, plus a seventy-five percent upward adjustment for a total of	$ 1,148.44

[3] These requests represent costs incurred since plaintiff's initial motion for attorney fees was filed.

(5) 24.25 hours for Tom Ware at $35.00 per hour, totaling $848.75, plus a 200 percent upward adjustment for a total of	$ 2,546.25
(6) Expenses totaling	$ 325.00
SUBTOTAL	$ 18,270.94
TOTAL	$265,444.66

The Sixth Circuit in *Northcross v. Board of Education*, 611 F.2d 624, 636-39 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), established guidelines to be followed in calculating reasonable attorney fees. These guidelines require consideration of the following factors: (1) hours of service provided; (2) reasonable hourly rate; and (3) costs and expenses. Each of these factors, including the defendants' objections to them, will be addressed. In awarding fees, this Court is not compelled to accept all hours claimed, but any reduction must be identified and accompanied by the reason for disallowing the claim. *Id.* at 636-37.

Initially, defendants object to plaintiff's request for attorney fees for time spent in administrative and state proceedings. In *Webb v. County Board of Education of Dyer County*, 715 F.2d 254, 256-59 (6th Cir. 1983), the Sixth Circuit held that the Civil Rights Attorney Fee Awards Act does not allow an award of attorney fees for services rendered in optional state administrative proceedings. *Id.* at 257. The Supreme Court has granted certiorari to the Sixth Circuit in the *Webb* case, — U.S. —, 104 S.Ct. 1906 (Apr. 16, 1984) (No. 83-1360), and it is the decision of this Court to sever the issue of attorney fees

regarding administrative and state proceedings until final disposition of *Webb*.

Defendants have registered specific objections to the amount of hours claimed for specific tasks performed. Rather than pick out specific hours which appear excessive or duplicative, this Court shall deduct a percentage of the total hours to eliminate duplication and padding and to compensate for plaintiff's use of reconstructed time records. *See Northcross*, 611 F.2d at 636-37; *Kelley v. Metropolitan Cty. Bd. of Ed. of Nashville*, 558 F.Supp. 468, 477 (M.D. Tenn. 1983). A twenty percent reduction appears reasonable.

Defendants also object to plaintiff's request for fees for two consultants in this case, attorneys Roy Lucas and Lynn Miller. Although neither attorney has established an attorney-client relationship with the plaintiff nor entered an appearance in this cause, plaintiff asserts that their proficiency in abortion litigation was both reasonable and necessary to this action. This Court is not persuaded by this contention under the circumstances of this case. Although plaintiff's counsel may recover fees for time spent with consultants, the attorneys consulted in this case may not seek fees where no notice of appearance was entered.

The Court will now consider plaintiff's request for attorney fees regarding plaintiff's fee application. Plaintiff is entitled to recover attorney fees for the time spent litigating the fee issue itself. *Northcross*, 611 F.2d at 637; *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979). In the present case, plaintiff claims 97.75 hours in attorney fees and 246.50 hours in paralegal fees for preparing the

fee application. By plaintiff's calculations, plaintiff's counsel is entitled to $74,848.75[4] in fees for preparing a fee application for a case in which plaintiff seeks $125,032.22 for services rendered in this Court. This request is clearly excessive. Plaintiff's five-page motion for attorney fees for time spent in the United States District Court, accompanied by an eight-page memorandum in support thereof, is not indicative of the 394.65 man hours[5] alleged to have been spent on this application. The Court is sensitive to the time-consuming proposition of reconstructing time records and preparing a fee application; however, plaintiff's request cannot be characterized as reasonable under the circumstances of this case. Consequently, taking into account the "relevant factors" enumerated in *Northcross,* 611 F.2d at 642, it is this Court's finding that plaintiff's counsel shall be compensated for twenty hours at the fair market value of the attorney's services plus forty hours of paralegal work. *See Smith v. Heath,* 691 F.2d 220, 228 (6th Cir. 1982).

The Court will now turn to the issue of a reasonable hourly rate for the services provided. Plaintiff seeks an award of $125.00 per hour for the services of attorney Bart Durham, $90.00 per hour for the services of attorney Vickey Verwey, $90.00 per hour for the services of attorney Marion Wall, $90.00 per hour for the service of attorney Dick Davis, $90.00 per hour for the services of attorney Dick

---

[4] This figure represents the sum of plaintiff's initial request for attorney fees for preparing the fee application ($62,538.75), plus supplemental requests of counsel of record ($12,310.00).

[5] This figure represents the sum of hours represented by plaintiff to have been expended in preparation of plaintiff's fee application.

Eason, $35.00 per hour for the services of paralegal Anne Johnson and $35.00 per hour for the services of paralegal Tom Ware. The level of compensation should represent the fair market value of the services provided, and current hourly rates will be applied to plaintiff's request. *Kelley,* 558 F.Supp. at 478. It is the finding of this Court that a reasonable rate in this community for the services of Mr. Durham is $90.00 per hour. Moreover, again applying the factors set forth in *Northcross,* 611 F.2d at 638-39, this Court concludes that a reasonable fee for attorneys Verwey, Wall, Davis and Eason is $60.00 per hour. Paralegals Johnson and Ware shall be reimbursed at the rate of $25.00 per hour.

The Court will now consider plaintiff's contention that he is entitled to an upward adjustment of his hourly fee pursuant to *Northcross,* 611 F.2d at 638 (contingency, difficulty or unpopularity may justify an enhancement of the award). *See also Blum v. Stenson,* — U.S. —, 104 S.Ct. 1541, 1548-50 (1984); *Hensley v. Eckerhart,* — U.S. —, 103 S.Ct. 1933, 1940 (1983). It is the opinion of this Court, in accordance with the purpose of the Fee Awards Act, that the circumstances of this case do not merit an upward adjustment. Plaintiff's success was predicated not upon his own ability and endeavor as this issue wound its way to victory before the Supreme Court but rather hinged on the outcome of another case with the identical issue. *See Akron Center for Reproductive Health, Inc. v. City of Akron,* — U.S. —, 103 S.Ct. 2481 (1983). To permit plaintiff to recover an upwardly adjusted fee based on the success of the plaintiff's attorneys in *Akron* is not warranted. Indeed, fortuity is not an element to consider when contemplating an upward adjustment.

The Court will now consider the third element of the guidelines established in *Northcross,* costs and expenses. 611 F.2d at 639-40. Defendants object to reimbursement of travel expenses at current costs of such travel.[6] In *Louisville Black Police Officers v. City of Louisville,* 700 F.2d 268 (6th Cir. 1983), the Sixth Circuit noted that *Northcross* "does not mandatorily *require* the district court to adjust for inflation in every fee award. Rather, in keeping with the discretionary nature of fee awards, *Northcross* required only that the district court in that case consider whether the inflation of the intervening years must be taken into account." 700 F.2d at 274-75 (emphasis in original). It is the opinion of this Court that the applicants have been fairly compensated under the circumstances of this case without the addition of a present value-based calculation. *See Louisville Black Police Officers,* 700 F.2d at 175; *Northcross,* 611 F.2d at 640 (district court must consider the effect of inflation in its determination of award). Consequently, plaintiff's request for expenses are allowed for the actual expenses incurred. Meal expenses incurred are disallowed. *Kelley,* 558 F.Supp. at 479.

---

[6] Plaintiff notes that "[e]very case in the Middle District of Tennessee has allowed current rates." Plaintiff's Brief in Support of Motion for Attorney's Fees for Time Spent in United States District Court, at 5. In support of this proposition, plaintiff cites *Kelley,* 554 F.Supp. 468 and *Mader v. Crowell,* 506 F.Supp. 484 (M.D. Tenn. 1981). In *Kelley,* the court applied current hourly rates for the services provided and did not address the issue of current rates for expenses. 558 F.Supp. at 478-79. In *Mader,* plaintiff's argument for an inflation increase was rejected. 506 F.Supp. at 487. The Court would urge plaintiff to examine cited cases carefully before utilizing them as authoritative.

In accordance with the above discussion, plaintiff is entitled to recover attorney fees based on the following calculations:

Bart Durham

	206.75 hrs.	(amount requested)
	22.65 hrs.	(supplemental request)
=	229.40 hrs.	
less	45.88 hrs.	(20% across the board reduction)
=	183.52 hrs.	
+	20.00 hrs.	(amount allowed for preparation of fee application)
	203.52 hrs.	

203.52 hrs. x $90/hr. = $18,316.80

Vickey Verway

	132.50 hrs.	(amount requested)
less	26.50 hrs.	(20% across the board reduction)
=	106.00 hrs.	

106.00 hrs. x $60/hr. = $6,360.00

Marion Wall

	4.5 hrs.	(amount requested)
less	.9 hrs.	(20% across the board reduction)
=	3.6 hrs.	

3.6 hrs. x $60/hr. = $216.00

Dick Eason

	3.5 hrs.	(amount requested)
less	.7 hrs.	(20% across the board reduction)
=	2.8 hrs.	

2.8 hrs. x $60/hr. = $168.00

Dick Dorris

1.0 hrs. (amount requested)
less .2 hr. (20% across the board reduction)

= .8 hr.

.8 hr x $60/hr. = $48.00

Anne Johnson

64.0 hrs. (amount requested)
less 12.8 hrs. (20% across the board reduction)

= 51.2 hrs.

51.2 hrs. x $25/hr. $1,280.00

Tom Ware

24.25 hrs. (amount requested
less 4.85 hrs. (20% across the board reduction
= 19.40 hrs.
+ 40.00 hrs. (amount allowed for preparation of fee application)

= 59.40 hrs.

59.50 hrs. x $25/hr. = $1,458.00

Durham	$18,316.80
Verwey	6,360.00
Wall	216.00
Eason	168.00
Dorris	48.00
Johnson	1,280.00
Ware	1,485.00
	27,873.80
Expenses	+ 2,420.07
	$30,293.87

Defendants will tender attorney fees to the plaintiff in the amount of $30,293.87. An appropriate ORDER shall enter.

This the 13th day of September, 1984.

/s/ John T. Nixon
UNITED STATES
DISTRICT JUDGE

(2)

No. 86-1490

Supreme Court, U.S.
FILED
APR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

Ned R. McWherter, Governor of the State of Tennessee, and W.J. Michael Cody, Attorney General of the State of Tennessee,

Petitioners,

vs.

Leonard J. Brooks, M.D.,

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bart C. Durham, III
1712 Parkway Towers
Nashville, Tennessee 37219
(615) 242-9000

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE WRIT	1
CONCLUSION	2
APPENDIX A	App. 1

TABLE OF AUTHORITIES

Page

CASES

Pennsylvania et al. v. Delaware Valley Citizen's Council for Clean Air, S.Ct. No. 85-5 ..... 1, 2

RULES

United States Supreme Court Rule 23.2 2

United States Supreme Court Rule 35.1 2

United States Supreme Court Rule 37.3 2

United States Supreme Court Rule 38.1 2

REASONS FOR DENYING THE WRIT

The sole reason presented by the petitioners for the issuance of a writ of certiorari in this cause is the current presence in this Court of a case which has already been argued (twice) upon what may or may not be the "identical" issue as that presented herein, in *Pennsylvania et al. v. Delaware Valley Citizen's Council for Clean Air,* S.Ct No. 85-5, decided in part, — U.S. —, relevant issue reargued October 15, 1986. Petitioners assert that the granting of the writ "will prevent [this case] from becoming final . . . . [and] ensure that this Court's eventual ruling on the question common to both [cases] will apply to [this] case." [Petition for Writ of Certiorari, pp. 6-7.]

Respondent's objection to the granting of the writ centers upon the undeniable fact that these objections can be equally achieved through simpler means which do not entail any of the costs (to the respondent, to the Court, and even to the petitioners) necessitated by the granting of the writ.

Specifically, respondent notes that the decision of the Sixth Circuit Court which is appealed herein does not adjudicate a final judgment on the relevant issue, but instead merely remands the case to the District Court for further proceedings (which shall themselves be appealable if the need be perceived by either party). Thus, petitioners surely overstate the need of a writ of certiorari to "prevent [this] decision . . . . from becoming final."

In any event, a more than adequate remedy has been provided to petitioners by a stay of all further proceedings in the District Court until such time as this Court has rendered its opinion in *Delaware Valley Citizens',*

supra., granted by the District Judge on March 24, 1987. Appendix A. This will obviously ensure that the Court's ruling therein will be applied to this case.

Moreover, such reliance upon the stay granted herein by the District Court in lieu of the granting of certiorari will result in a significant savings of time, money and effort on the part of both parties and the Court, in that it will avoid the necessity of the filing of briefs for each party, as required by United States Supreme Court Rules 23.2 and 35.1, and of oral argument, as all but mandated by Rule 38.1. This is especially so inasmuch as the *Delaware Valley Citizens'* case has already been argued, and it is too late for the Court to order that the two cases "be argued together as one case", pursuant to Rule 37.3.

—o—

CONCLUSION

Inasmuch as the granting of certiorari herein would provide no benefits to either party that are not already available through less costly means, and would appear to serve no purpose but to increase the workload and costs to the parties and the Court, respondent respectfully requests that the petition for writ of certiorari be held in abeyance pending a ruling in *Delaware Valley Citizens', supra.*

Respectfully submitted,

BART C. DURHAM, III
1712 Parkway Towers
Nashville, Tennessee 37219
(615) 242-9000

Attorney for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

LEONARD J. BROOKS, M.D., Plaintiff,	)	
vs.	)	
LAMAR ALEXANDER, Governor of the STATE OF TENNESSEE; and WILLIAM LEECH, JR., Attorney General of the STATE OF TENNESSEE, Defendants.	)	No. 79-3065-NA-CV
	)	JUDGE NIXON

MOTION TO STAY

(Filed March 18, 1987)

The defendants in this cause, the Governor and Attorney General for the State of Tennessee, respectfully request that the Court stay all further proceedings in this action until the United States Supreme Court rules on the defendant's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the matter of the *Governor and Attorney General of the State of Tennessee v. Leonard Brooks, M.D.*, United States Supreme Court No. ———. (Petition for Writ of Certiorari filed March 9, 1987. The plaintiff does not oppose this Motion.

Respectfully submitted,

W. J. Michael Cody
Attorney General and Reporter

/s/ Frank J. Scanlon
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1963

ORDERED

Entered March 23, 1987.

SO ORDERED
/s/ JOHN T. NIXON
U.S. District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Stay and Memorandum in Support thereof have been forwarded to Mr. Bart Durham, Attorney at Law, BART DURHAM & ASSOCIATES, 1712 Parkway Towers, 404 James Robertson Parkway, Nashville, Tennessee, 37219, on this 18th day of March, 1987.

/s/ FRANK J. SCANLON
Deputy Attorney General